The Solicitors' Journal

Vol. 94 September 16, 1950 No. 37

CURRENT TOPICS

The Legal Aid Scheme, 1950

ALL solicitors should now take steps to obtain a copy of the Legal Aid Scheme, 1950, made by The Law Society with the approval of the Lord Chancellor and the concurrence of the Treasury (H.M. Stationery Office, price 6d.). An article on the subject of the scheme appears in this issue at p. 587. As the days draw closer to 2nd October, 1950, when the Act comes into operation, many solicitors are wondering whether there will follow a sudden increase of litigation. It seems to be generally agreed that numbers of the middle classes will now seize their opportunity to petition for divorce. Whether they will constitute anything like the flood of previous years, bearing in mind that service divorces disposed of an immense number of broken marriages, and that the unrest of a post-war period shows signs of subsiding, is more questionable. One of the anomalies of the service is that bankruptcy proceedings in the High Court are subject to it, while those in the county court will presumably remain outside until county court work is brought within its scope. It may be found that the increase in bankruptcy work and the unfairness as between London and provincial debtors will necessitate some adjustment in this respect. No one expects that on 2nd October there will be a sudden increase in demand for the issue of writs in any way comparable to the sudden demand for spectacles, wigs and dentures that accompanied the coming into force of the National Health Scheme. But the service must nevertheless be prepared to meet at once all demands that may conceivably be made upon it, and it is reassuring to know that recruitment to the panels is proceeding apace. As we go to press it is announced that to date 5,000 solicitors and 550 barristers have intimated their willingness to take part, and we cannot doubt that many more will shortly do so.

A Speed Limit Case

A DECISION on 7th September by the Surrey Sessions Appeals Committee, it was stated by the chairman, might result in something like a revolution in the summary trial of charges against motorists of exceeding the speed limit. The motorist charged had admitted a speed of 50 miles per hour, but he was held to have been wrongfully convicted of exceeding the 30 miles per hour speed limit in a built-up area because the prosecution had not proved that the local authority had made an order directing that the road should be subject to the speed limit. The chairman, His Honour Judge TUDOR REES, said that although there were signposts on the road indicating a speed limit, the court did not know, and they could not assume, that the local authority had taken the prescribed steps to make an order imposing the speed limit; but that was a vital and essential feature of prosecutions of that sort. As far as the court knew, it had never been the practice in magistrates' courts to require the proof which it had been submitted was necessary. It appeared generally to have been assumed, if it were proved that signs existed,

CONTENTS

that they were erected by proper authority and secured in the prescribed manner. The court held that there must be proof of the existence of a "direction" made by the local authority in accordance with s. 1 of the Road Traffic Act, 1930.

Bank Mortgages

A NEW arrangement has been made between the Council of The Law Society and the Clearing Banks under which, when a customer wishes to sell property charged or mortgaged to a bank, the bank, in addition to handing over the title deeds to the customer's solicitors on a suitable undertaking being given, as hitherto, will also either hand over the mortgage or charge undischarged to the solicitors, or, if it is retained, notify its existence to the solicitors by means of a special form (to be included with the title deeds and listed on the schedule of deeds which the solicitors are asked to receipt) or draw the solicitors' attention to it in some other appropriate manner.

Justices: Lay or Stipendiary

ENTERING the lists of public controversy is not usual conduct on retirement, and those who have the courage and vitality to do so deserve congratulation and invite emulation. Dr. F. J. O. CODDINGTON, who is due to retire as Bradford's stipendiary magistrate on 31st October, 1950, has made a strong comment on the proposal, which seems to have the support of the other justices of Bradford, that there is no occasion for the appointment of a successor to himself. Dr. Coddington stated that it was quite out of date in the present circumstances for Bradford to have but one stipendiary. In his opinion there should be either four or five stipendiary magistrates to do all the work or none at all. All the work should be done the same way, not a fraction done by a professional man and the rest by laymen. He pointed out that when he was first appointed he did well over half the work, but in the course of time the work increased and his strength diminished, with the result that he could only take on a smaller proportion. There are at present sixty lay magistrates in the city, and Dr. Coddington suggested that if no other stipendiary was appointed there would be a good case for a substantial increase in the number of lay magistrates in Bradford. He contended that despite the less amount of work he was doing he still took the place of six laymen. Whatever lay magistrates think of themselves, most members of the legal profession who appear before lay and stipendiary magistrates have little doubt as to which type of tribunal they prefer, and which they find most expeditious. This is not to say that lay justices are not indispensable or that they fail to perform a useful function under present conditions, but the profession, and we venture to submit the public, would welcome a scheme for the administration of summary justice in which stipendiary magistrates could play a greater part.

Local Government Superannuation

CIRCULAR 82/50, issued by the Minister of Health on 4th September, refers to s. 6 of the Superannuation (Miscellaneous Provisions) Act of 1948 and to Circular No. 86/48, dated 4th June, 1948, in which he directed that the period ended 30th June, 1949, should be treated as the period of emergency for the purposes of s. 6. Representations have now been made to the Minister that, as a result of action taken by local authorities at the renewed request of the Ministry of Transport to reduce their expenditure on highway maintenance, employees are being dismissed, and that it is desirable that the Minister should declare a further "period of emergency" for the purpose of s. 6 of the Act of 1948 in order that the provisions of subss. (2), (3), (4) and (5) of that section should be available to those employees who had acquired superannuation rights at the date of ceasing to be employed. The Minister has accordingly directed that the period ending 30th June, 1951, shall be treated as the period of emergency for the purposes of this section. Any person ceasing to be employed during this period can obtain the advantages afforded by this section if the local authority certify that the cessation of the employment is due to action taken for the temporary reduction of expenditure or for the purpose of making him available for other employment.

Movable Dwellings

THE report of the Movable Dwelling Conference, 1947–49 (published by the Town and Country Planning Association, 28 King Street, London, W.C.2, price 2s. 6d.), is the first comprehensive and authoritative survey of problems arising from camping, caravanning, sub-standard housing, shacks, etc. Giving both the causes of the problems and the recommended remedies, and in many instances going into considerable detail, it is likely to become the indispensable handbook for everyone concerned with the planning, public health, sociological and other aspects of these activities. The Movable Dwelling Conference, comprising representatives of many different interests—local authority, professional, user, amenity defence, etc.—was convened in 1947 by the Town and Country Planning Association and the Caravan Club. From its discussions the drafting committee, Mr. E. J. O. GARDINER, LL.B., Town Clerk of Andover, Mr. W. O. HUMPHERY, M.T.P.I., County Planning Officer, East Sussex, and Mr. W. M. WHITEMAN, M.A., Executive Committee, Caravan Club, have produced a report that was badly needed. Running to nearly 40,000 words of fact-finding, explanation, and recommendation, it covers historical and contemporary survey, formulation of policy, planning, public health, temporary housing, law, administration, camping and site standards, shack colonies, gypsies, etc. Persons taking part in the conference included planning officers, town clerks, surveyors, medical officers of health, sanitary inspectors, local councillors, planning consultants, engineers, lawyers, champions of the countryside, campers, caravanners and showmen.

Industrial Arbitration

AMONG general practitioners in the law the procedure and technique of industrial arbitration are not well known. The keynote, it would appear from the annual report of the Ministry of Labour and National Service for 1949 (Cmd. 8017, H.M. Stationery Office, price 4s.), published on 4th September, is conciliation. Since the war the highest number of cases referred to the National Arbitration Tribunal occurred in 1949. Throughout the year the number of cases of claims for increased wages that were settled through conciliation or arbitration was noticeable. Many of these claims covered entire industries. By the end of 1949 about 80 per cent. of some 20,000,000 workers in British industry were covered by either voluntary or statutory negotiating machinery. During the year 403 disputes were settled by agreement between the parties at or following meetings arranged by the Ministry's conciliation officers. In more than a hundred other cases the parties consented to voluntary arbitration, and about half of these were referred to the industrial court. The National Arbitration Tribunal made awards in 188 of the 247 cases referred to it.

LEGAL AID—THE SCHEME

THE Law Society's detailed Scheme for the purposes of Pt. I of the Legal Aid and Advice Act, 1949 (which, of course, comes into operation on 2nd October), having been approved by the Lord Chancellor and blessed by the Treasury, has now been published by H.M. Stationery Office (price 6d. net). Happily its somewhat belated appearance should not cause much inconvenience, since the essential features of it have already been made known to the profession in a booklet circulated by The Law Society about the middle of August. The availability of this final document does nevertheless make it possible for the first time to review the whole of the new arrangements in detail, and a few comments on it may therefore be of interest.

The legislative framework of the new service consists of the Act (the details of which were considered in a series of articles in these columns), the General and Assessment of Resources Regulations (briefly reviewed at p. 541, *ante*) and the Scheme. The Law Society, who have already circulated the explanatory booklet referred to above and sponsored the illuminating lectures of their Secretary, have stated their intention of reprinting the Act, Regulations and Scheme in one volume.

The Scheme, which seems to be an anomalous form of delegated legislation having no definite status, such as that of a Statutory Instrument, has been made by The Law Society's committee under s. 8 of the Act. On the scheme-making committee the Bar Council was of course represented, and the Scheme (which in this respect merely follows the Act) expressly provides that on any committee of the Society concerned with legal aid there shall be not less than three barristers and a representative of the Lord Chancellor unless the Bar Council or the Lord Chancellor desires otherwise.

The Scheme, dated 21st August, 1950, is divided into thirty-four paragraphs, grouped under the headings used below, and has two schedules giving geographical details of areas and area headquarters and of local committees respectively.

Areas and Areas Committees

England is divided into 12 areas with headquarters in London, Croydon, Reading, Bristol, Cardiff, Birmingham, Manchester, Newcastle, Leeds, Nottingham, Cambridge and Chester. Each area is to have a committee of 16 members, 12 solicitors and four barristers nominated by the Council of The Law Society (after consultation with any local Law Society) and the Bar Council respectively. Members are to hold office for three years and to be eligible for reappointment. The committees have control of the general administration of the Scheme within their areas and are to appoint local committees.

Local Committees

In Area 1 (London), where work can be centralised, there will be only one local committee though its membership will obviously be vast. All other areas are to be served by a number (between 6 and 19) of local committees centred at the towns specified in Sched. II and each having not less than five members. These, too, will so far as possible have barrister members as well as solicitors, and they will hold office on the same terms as members of the area committees. Generally their functions (mainly that of considering applications for civil aid certificates) will be exercised through sub-committees known as certifying committees consisting of between three and five members (including where practicable a barrister).

It is understood that the constitution of the original area and local committees is now complete, and that the aim has been to have sufficient members on local committees to avoid having to summon any one member to serve on a certifying committee more frequently than about once every three months.

General Provisions as to Committees

The paragraphs of the Scheme under this head lay down in general terms provisions as to procedure (quorums, election of chairmen, minutes, remuneration, registration, disqualification and removal). All that need be mentioned here is that members are to be paid travelling and subsistence allowances and 2½ gns. (3 gns. for chairmen) per session, and that the Council of The Law Society may remove any member from office, but, in the case of a barrister, only after consultation with the Bar Council and with the concurrence of the Lord Chancellor.

A general criticism of the drafting of this part of the Scheme is that the attempt to apply a common set of regulations to all the various committees has produced brevity but sometimes at the cost of clarity. It is suggested that it might have been preferable to deal separately with certifying committees, thus avoiding the constant insertion of "other than a certifying committee", which is inelegant and occasionally confusing.

Annual General Meetings

For the purpose of considering the working of the new arrangements, a combined annual general meeting of each area committee and all its local committees is to be held within four months of the coming into force of the Scheme and thereafter at intervals of not more than 15 months.

Panels

One of the responsibilities of the area committee is to maintain the panels of solicitors and barristers willing to act for persons requiring legal aid. Details of these panels have already been circulated to the profession and little need be said here. The solicitors' panels are straightforward: there are six of them with an additional panel for London agency business in Area 1, and any solicitor may volunteer for all or any of them. The bulk of the work in the early stages will obviously be under Panel (v) (Matrimonial Causes), but it is assumed that most solicitors will volunteer for all panels, except perhaps Admiralty (which is highly specialised and not likely to be invoked at all frequently. Solicitors will join panels individually in their own names, but will act in the names of their firms, which will also appear on the panels. It seems therefore that an applicant will finally have to select an individual solicitor, but, since he is more likely to have heard of a firm than an individual partner in it, may start by selecting the firm and then making a choice of any of its partners who are on the panels. In practice, all firms who choose to enter the service will presumably do so in the names of all their partners, since this may multiply their chances of being selected by applicants adopting the method of selection by firm.

The panels for counsel are somewhat more complicated as steps have been taken to make them conform to the circuit system and to the greater degree of specialisation that exists in that branch of the profession. Moreover, a barrister, unlike a solicitor, may qualify his entry on any panel so as further to restrict the type of assisted cases in which he is prepared to appear.

The selected solicitor or counsel is not compelled to accept a case and he may give it up or resign completely from a panel. But if required he must report to the area or local committee his reasons for refusing to accept a case or for giving it up, and if he habitually declines cases for inadequate reasons this would presumably be a reason for taking steps to remove him under the complaints procedure outlined below. It is expressly provided that a solicitor must not refuse or give up a case merely because it has been remitted to the county court, although he may then entrust it to another solicitor who is a member of the appropriate panel.

It is felt that this question, of what grounds justify a refusal to accept a case, is one upon which further guidance is required. The Scheme says no more, and the General Regulations merely provide that " without prejudice to the right . . . to give up a case for good reason, any solicitor or counsel may give up an assisted person's case if in his opinion the assisted person has required the proceedings to be conducted unreasonably . . ." (reg. 14 (7)). This, of course, gives no guidance at all upon grounds for initial refusal. It is fairly clear that the selected solicitor is not entitled to substitute his own view of the propriety of bringing the action for that of the certifying committee. If, therefore, he has put his name on a panel he should presumably accept any case coming within the scope of that panel unless there are personal reasons to the contrary (such as the fact that he has acted for the other party). But what is the position if he sat on the certifying committee which granted the aid certificate? If the committee never actually saw the applicant there can be no grounds for suggesting that he should decline to accept the case, but if, as will presumably be the normal practice, the certifying committee interviewed the applicant, it may be argued that he should refuse. If in fact that is the correct answer, it seems an undue hardship to solicitors who, out of a sense of public duty (for the remuneration is certainly not sufficient to act as an inducement), agree to serve on local committees. On the other hand, it is not far-fetched to suggest that such service may give them a pull over their colleagues who may be equally willing to serve but who may not have been asked. The average applicant will not know one firm from another and when asked to select a solicitor will probably reply: " I should like the nice old boy who was chairman." A number of potential " nice old boys " would appreciate a ruling on how they should act in such circumstances. Is interviewing an applicant on a certifying committee to be treated as equivalent to advising as a poor man's lawyer, or is it not?

Complaints

A special tribunal, known as the Panel (Complaints) Tribunal, is to be set up to deal with complaints. If an area committee consider that there may be good reason for excluding a solicitor or barrister from a panel, they are to bring the matter to the notice of the Council of The Law Society, who, if the complaint concerns a barrister, must notify the Bar Council. If the appropriate Council consider that there may be good reason for exclusion from a panel they may refer the matter to the tribunal. In the case of a complaint against a solicitor, the tribunal shall consist of the President or Vice-President of The Law Society, three solicitor members (or ex-members) of the Legal Aid Committee and the Lord Chancellor's representative on that committee. In the case of a barrister, the Chairman or Vice-Chairman of the Bar Council and three barrister members of the Legal Aid Committee are substituted for the equivalent solicitor representatives. Detailed rules of procedure are to be laid down by an *ad hoc* rule committee. If the tribunal consider that a complaint has been substantiated they can exclude the culprit and any partner of his from any panel either permanently or temporarily. Although such an exclusion would not of course be as grave as disbarring or striking off the rolls (although in a really bad case it might lead to the Benchers or Disciplinary Committee taking that step after an independent hearing), it could nevertheless have serious consequences to the lawyer's subsequent career. Nevertheless, it is not thought that practitioners need feel that they are exposed to any undue risk; not only is the original complaint subject to a two-fold screening (by the area committee and The Law Society or Bar Council) before it ever reaches the tribunal, but the constitution of the tribunal is one which commands the utmost confidence, and there is in any case a right of appeal to the High Court.

Costs

The general position relating to costs is set out in Sched. III to the Act and in the General Regulations. The Scheme merely deals with the exceptional cases where costs are not taxed but the area committee authorise a payment to the lawyers concerned. This they may do when application is made for a payment on account of disbursements—a useful provision which will avoid the necessity for solicitors to finance the action until its conclusion. Again, it rests with the area committee to settle the amount payable where a retainer is determined before proceedings are actually begun. In the latter case the solicitor concerned must lodge a gross sum bill (which must show the amount of any remuneration sought in respect of counsel) and will not have to lodge a detailed bill and supporting vouchers unless called upon to do so by the area committee. It would appear, therefore, that in general area committees will deal with the matter much on the lines adopted as between solicitors when agreeing costs and, mercifully, will normally refrain from any attempt to tax item by item.

While on the subject of costs it may be mentioned that The Law Society's explanatory booklet makes it clear that, where one solicitor acts as agent for another, a single bill of costs will be rendered, the amount of which will be divisible between the principal and agent in whatever way they agree. Agency work under the Scheme is likely to be ill-remunerated, but it is at least reassuring to know that the Scheme will not interfere with the unofficial arrangement regarding costs recently made by most of the larger London agency firms. The booklet also elucidates the position regarding counsel's fees. Counsel's clerk will send to the solicitor a note of what he considers to be the appropriate fees (without making the 15 per cent. reduction applicable except where the action has been remitted to the county court) and may accompany it by a memorandum on any factors affecting these fees. The amount so stated will be inserted in the solicitor's bill for taxation. Further information as to the procedure on taxation of these fees is to be circulated in due course. Actual payment to counsel will be made, not by the solicitor, but by The Law Society out of the Legal Aid Fund.

L. C. B. G.

Mr. Keith Miller Jones, solicitor, of Arundel Street, Strand, London, W.C.2, was married on 2nd September to the Hon. Betty Askwith.

The search rooms of the Public Record Office will be closed for stocktaking from 25th to 30th September. Special arrangements will be made for the transaction of urgent legal business.

THE R.S.C. IN THE COURTS, 1949-50—II

Service out of the Jurisdiction

A steady flow continues of cases under one or more of the sub-heads of Ord. XI, r. 1. The Court of Appeal dealt at the beginning of 1950 with two cases arising under r. 1 (*e*), which empowers the court to authorise service out of the jurisdiction of a writ or notice of a writ in an action brought in respect of a breach committed within the jurisdiction of a contract wherever made. Matters under Ord. XI when they proceed beyond chambers do so, as a rule, by way of an application on the part of the defendant to set aside the service of a writ already authorised. It is not until the writ has been served that it is possible to argue both sides of the question satisfactorily. At this stage the hearing is frequently concerned with important questions of substantive law, often of an international flavour, but it happened that both *International Corpn., Ltd.* v. *Besser Manufacturing Co.* (*ante*, p. 178) and *Korner* v. *Witkowitzer* (*ante*, p. 269) dealt chiefly with procedural matters. In support of an application for service out of the jurisdiction a plaintiff must make out on affidavit a *prima facie* case coming within one of the sub-heads of the rule, and on that affidavit the court will consider whether or not its discretion ought to be exercised in his favour. The cases under discussion illustrate two points with regard to this affidavit and the proper basis for the exercise of the court's discretion. In the first place there must be the fullest disclosure to the court, as in all *ex parte* applications. The criticisms of insincerity and inconsistency levelled at the affidavit in the *Besser* case were advanced on that footing, though they were not such as to induce the Court of Appeal to refrain from authorising service abroad.

Secondly, as to the degree of proof or verification, in *Besser* the affidavit stated that certain commission due to the plaintiffs under the contract sued on was payable in England and the court, investigating that statement, decided that *prima facie* it was correct, following the English principle that a debtor must seek his creditor. A similar point was rather more closely contested in *Korner's* case, where the breach of contract sued on was also the non-payment of money alleged to be payable within the jurisdiction. As showing that the money was payable here, the plaintiff Korner had alleged an oral contract to pay him in whatever country he was living at the time when the payment accrued. The defendants were unable specifically to deny this because of the death of the representative with whom the oral contract was alleged to have been made, but they challenged the allegation. Slade, J., directed himself that, for the purpose of this contested allegation bearing on the place where the breach of contract occurred, he had to apply a different test from that applicable to the question whether the fact of the contract and its breach had been sufficiently verified. It would be necessary at the trial for the contract and the breach to be strictly proved; at this stage the court was concerned merely with the question whether a *prima facie* case of breach had been made out. On the other hand, the *place* where the breach took place would be of no importance at the trial; that was material only as a basis for the exercise of the discretion to order service abroad. Accordingly, Slade, J., held it necessary for the court to be *satisfied* in cases under r. 1 (*e*) that the breach of contract alleged did occur within the jurisdiction, and a majority of the Court of Appeal upheld him. A differently constituted majority thought that the learned judge should have been so satisfied in the case before them, and reversed the order setting aside the writ.

Discovery

A somewhat exceptional Chancery decision in *Speyside Estate & Trust Co., Ltd.* v. *Wraymond Freeman (Blenders), Ltd.* (1949), 93 Sol. J. 773, is worth a glance as a reminder that under Ord. XXXI, r. 14 (applicable, of course, in all divisions), it is sometimes possible for a party to obtain discovery of documents before pleading. In that case Wynn Parry, J., was satisfied that in the absence of discovery, "unless a miracle of speculation was achieved by the pleader," substantial amendments in his pleading would have to be made when discovery was eventually ordered, and on the plaintiff's application he allowed discovery before even the statement of claim had been delivered. It is obvious that only in an unusual case would such an order have been made; the *Speyside* case was an action to trace moneys of which the defendants were trustees, and they alone knew what dealings had taken place with the money.

Right of Audience

Litigants of limited means or of uncommon forensic ability comparatively frequently conduct their own cases in court, even when fortified by the advice of a solicitor behind the scenes and represented by him in the interlocutory stages. There is no objection to this well-settled course of proceeding, which is the only exception to the rule that counsel alone has a right of audience as an advocate in the High Court in open sitting. An incorporated company can only be heard through counsel. Romer, J., in *Animal Defence and Anti-Vivisection Society* v. *I.R.C.* (*ante*, p. 420), declined to hear a president and founder of an *un*incorporated society in a matter to which the society itself was the party. The president was not, in respect of that matter, a litigant in person.

Time

The actual physical delivery of pleadings and other documents in an action is a matter commonly left to a junior member of the office. No one suggests that it should be otherwise, but the necessity for keeping a knowledgeable eye even on such routine steps is brought home by the case of *Kaye* v. *Levinson* [1950] 1 All E.R. 594. It is now two years since the rules as to time, having been amended to allow for war conditions, were in the main restored to their former limits. By Ord. LXIV, r. 11, however, service of the proceedings there mentioned is still to take effect as from the following day if made after 4 p.m. on a weekday other than Saturday. The time of day remains as amended in 1940. The statement of claim in *Kaye* v. *Levinson* was delivered at 5.45 p.m. on the last day allowed by an order of the court for its delivery. Under the rules, then, it appeared to be out of time and the plaintiffs may be said to have had a narrow escape from the penalty of having their action dismissed. The Court of Appeal, however, thought that the order which directed the dismissal of the action in default of timely delivery of the statement of claim was ambiguous, in that it did not make it clear whether or not regard was to be had to Ord. LXIV, r. 11, in ascertaining whether the condition of the order had been fulfilled. In the circumstances the court extended the time.

Summary Judgment

Where on an application under Ord. XIV the defendant sets up a counter-claim but has no other defence, it is the

common practice to order judgment for the plaintiff's claim subject to a stay of execution pending the trial of the counter-claim. It was decided in *Morgan* v. *Martin Johnson* (1948), 92 SOL. J. 391, that, notwithstanding this convenient practice, the defendant is entitled, if he insists, to unconditional leave to defend if the counter-claim is such that a court of equity would have regarded it as a set-off on the hypothesis that both claim and counter-claim were pending before it. *James Lamont & Co., Ltd.* v. *Hyland, Ltd.* (No. 2) (*ante*, p. 336) cuts down this privilege of the defendant (and, indeed, disentitles him to the benefit of a stay of execution) where the action is between immediate parties to a bill of exchange and the matters relied on by the defendant, though giving rise to a counter-claim, afford no defence under the Bills of Exchange Act. Roxburgh, J., delivering the judgment of the Court of Appeal, referred to authorities in which, he said, the court had treated the execution of the bill as being "analogous to a payment of cash or as amounting to an independent contract within the wider contract in pursuance of which it was executed, and not dependent as regards its enforcement on due performance of the latter." In giving leave to sign judgment on the bill without a stay, the judge in chambers had not exercised his discretion improperly.

J. F. J.

A Conveyancer's Diary

BEQUESTS TO NATIONALISED HOSPITALS AGAIN—II

THE portions of the Act which I set out last week, with their complicated and at times strange language, are obviously difficult to apply to any gifts; but in the case of testamentary gifts there is the further complication, implicit in the nature of such a gift, of an interval between the date of the will and the date of the death, and a further interval between the date of the death and the date on which administration of the estate is completed. There are several distinct possibilities which may thus arise.

Assuming in such case a will containing a bequest to a hospital nationalised under the Act, the following cases may occur:—

(*a*) The testator may have died and his estate may have been completely administered before the appointed day. If his bequest took the form of a simple legacy or a simple trust for a single hospital, the subject-matter of the legacy would have become an endowment of the hospital and would then have been dealt with by s. 7 of the Act. If the bequest took the form of a direction to trustees to pay an aliquot portion of the income, or to hold an aliquot portion of the capital, of a fund to or for the benefit of a hospital, the bequest would have come within s. 60 (1) and been dealt with under that provision (on the latter point see *Re Gartside* [1949] 2 All E.R. 546 and *cf.* the decision of the Court of Appeal in *Re Kellner's Will Trusts* [1950] Ch. 46).

(*b*) The testator may have died, but his estate may not have been fully administered before the appointed day; in this case, whether the gift took the form of a simple legacy or trust, or of a direction to hold or pay an aliquot share of the capital or income of a fund for or to a hospital, the benefaction is caught by s. 60 (1) (see *Re Kellner*, *supra*, a case of a simple legacy, but one in which the decision justifies, I think, the extension I have given to its effect).

(*c*) The testator may have died after the appointed day, leaving a will made after the appointed day; his benefaction would, as I see it, be caught by s. 59 (1), and no question of lapse could arise in such a case.

(*d*) Finally, the testator may have died after the appointed day, leaving a will made before the appointed day. This is the really difficult case, and whether it has been solved in *Re Morgan's Will Trusts* [1950] 1 All E.R. 1097; 94 SOL. J. 368, or not is a very open question.

In this case the testatrix died on the 28th September, 1948, having made a will dated the 9th August, 1944, by which she gave her residuary estate on trust for sale, and after making provision for certain payments thereout, on trust for the benefit of the Liskeard Cottage Hospital. This was, in fact, a misdescription since the hospital at Liskeard had another name, but the learned judge who decided the case had no doubt that the reference was to the hospital at Liskeard, and the misdescription had no bearing on the main question raised in the case, which was whether, in the circumstances, there had been a lapse.

Roxburgh, J.'s judgment may be summarised as follows: After dealing with the misdescription he referred to the omission from the evidence before him of any statement that the work of the hospital had been, since the appointed day, and was still being carried on on the premises of the Liskeard Hospital, and the judgment proceeded on the footing that that was the case, and that evidence to that effect would be filed before the order was drawn up. This is an important point, to be borne in mind not only on the occasion of a future reference to the court on a similar case, but also in connection with the judgment, which was coloured (although no further reference is made to it) by the assumption so made by the judge.

Reference was then made to the effect which the operation of the Act had had on the hospital, as follows: the building of the hospital had been divested from the trustees in whom it had been vested and transferred to the Minister, free from the trusts which previously affected it; the hospital's investments had been similarly divested and transferred, and the governing body of the hospital had been dissolved and the management and control of the hospital had been vested, under a scheme made under the Act, in a hospital management committee (who were among the defendants to the proceedings). Finally, reference was made to s. 59 of the Act, which, as will be recalled, empowers a hospital management committee to accept, hold and administer any property on trust for purposes relating to hospital services. Roxburgh, J., then went on to say that it had been submitted by counsel for the testatrix' next of kin that these circumstances, either singly or in combination, had caused the hospital to cease to exist. If that had been so they did so before the date of the testatrix' death and the result must be a lapse of the residuary gift, but in the view of the learned judge these factors, important as they were, did not affect the validity of the gift.

Then after a reference to the fact that the gift, which was a gift in a fairly common form, was not a gift to anybody but a gift for the benefit of the hospital, and that in much more difficult cases (which were not specified) the courts had been able to find that a gift such as this had not failed, though no work of the nature indicated was being carried on on the premises at the date of the testatrix' death, there follows a passage which contains, I think, the kernel of the judgment, in these words:—

" I have had under consideration three analyses of this gift. The first, supplied [by counsel arguing for a lapse] was this: A gift to the trustees for the time being of the Liskeard Cottage Hospital to be held by them as an accretion to the general funds of the hospital. I am satisfied that that analysis ought to be rejected. I see no reason whatever for importing trustees into the analysis of such a gift as this. [Counsel for the hospital] has offered me this definition: It is a gift for the general purposes of the hospital, and, so far, I agree with him entirely. He then went on to amplify that in this way, that is to say, a gift for the work which was at the date of the will of the testatrix being carried on on the premises which the testatrix has described. I see no reason to quarrel with [this] analysis. An alternative form of words has occurred to me which does not, I think, differ in substance from those which [counsel for the hospital] suggested. That alternative form would be to supplement the funds available for carrying on the work of the Liskeard Cottage Hospital . . .; whichever [form of words] be right the gift will not be defeated, because I agree entirely with [the submission of counsel for the hospital] that the essential feature is the continuity of the activity and, if the affidavit which I have indicated as being necessary is filed, that continuity of activity will be proved."

One further matter was then discussed. The hospital management committee in this case controlled and managed other hospitals as well as that at Liskeard. Section 59 of the Act simply empowers such a committee to accept, hold and administer property on trust, quite generally, for purposes relating to hospital services, i.e., to hospital services without any limitation as to locality or otherwise. Counsel for the hospital conceded that, in such a case as this, if the legacy were paid to the committee, it should be on the terms that it was only available for the work carried on at the hospital at Liskeard. This was a rather interesting admission in view of the general policy of the Act, which went out of its way in freeing from any trust the property of hospitals dealt with by ss. 6 and 7, and which can be said to be hostile to particular benefactions being earmarked as a matter of law, rather than as a matter of grace, for particular purposes, and all the more so because the same counsel represented the hospital management committee and the Minister of Health in this case. The admission was, thus, one which the Minister had to make in order to have the validity of the gift upheld. It is, therefore, an admission which will almost certainly be made in all similar cases, and must be taken into account in construing gifts of the kind in question in this case.

My comments on the judgment in *Re Morgan* will have to wait until next week.

" A B C "

Landlord and Tenant Notebook

NOTICE TO QUIT NON-AGRICULTURAL PART OF HOLDING

In the issue of 10th June the " Notebook " drew attention to a new feature of the definition of " agricultural holding " introduced by the Agriculture Act, 1947, and repeated in the Agricultural Holdings Act, 1948; roughly speaking, the importance of user for the purpose of a trade or business. I pointed out, however, that such user had often been considered of importance when deciding whether the 1923 Act, which made no specific mention thereof, applied. The article was written after I had read a short account in an agricultural journal of a county court case concerning the status of premises consisting of an inn and some orchards and pasture. The decision in that case has been (unsuccessfully) appealed and a perusal of the report (*Dunn* v. *Fidoe* (1950), 94 Sol. J. 579 (C.A.)) is of interest not only because of what it decided but because of what was said about the possibility that a notice to quit premises might now be found to affect part only of those premises. That the common law recognises no right to give notice to quit part is, one might almost say, commonplace and common sense; if authority were needed, *Rodd* v. *Archer* (1804), 5 East 491, would supply it; no one seems to have made any attempt since.

Dunn v. *Fidoe, supra*, was an action for possession. The premises were a licensed inn (" The Live and Let Live ") and nearly 12 acres of land, forming six " enclosures " used as pasture and orchard land (the pasture was sub-let). The house had been adapted for use with the land but was substantially used as an inn. Both activities yielded profit, the inn contributing the major share. The premises had been let to the defendant by the plaintiff's predecessor in title on a yearly tenancy, and the plaintiff, purchaser of the reversion, had given a notice to quit expiring at Michaelmas, 1949. It looks as if this notice was given at a time when Def. Reg. 62 (4A) automatically invalidated such notices unless consented to by the Minister of Agriculture and Fisheries, whether the tenant sent any counter-notice or not. At all events, the validity of the notice to quit was raised by the tenant, we are told, and the matter was dealt with by the county agricultural executive committee and, on appeal, by the Agricultural Land Tribunal, where consent was refused. The application for this consent was, one presumes, made without prejudice to the question whether or not it was necessary for the validity or effectiveness of the notice, for the plaintiff then brought his action notwithstanding the refusal, and contended that the premises were not within the definition of " agricultural holding " given in s. 1 (1) of the Agricultural Holdings Act, 1948.

That definition runs: " . . . the aggregate of the agricultural land comprised in a contract of tenancy, not being a contract under which the land is let to the tenant during his continuance in any office, appointment or employment held under the landlord," while the next subsection adds: " for the purpose of this and the next following section, ' agricultural land ' means land used for agriculture which is so used for the purposes of a trade or business . . ." These provisions replace the words " any parcel of land held by a tenant, which is either wholly agricultural or wholly pastoral, or in part . . . and which is not let to the tenant during his continuance . . ." of the Agricultural Holdings Acts of 1908 and 1923.

What really concluded the matter in favour of the defendant was a finding that the premises inhabited by him were a necessary part of the land. This meant that in that case, at all events, the whole of the demised premises was agricultural.

It may be remembered that while the 1908 and 1923 definitions were the same, a special provision was inserted in the 1923 Act which entitled tenants of mixed properties to claim compensation for improvements and disturbance in

respect of the agricultural parts, but did not give them any security of tenure. There is no corresponding provision in the present statute, and this, perhaps, makes a suggestion thrown out by the court when dealing with one of the arguments advanced for the appellant the more plausible.

It had been urged that a dominant or main user test should be applied, as was done in a case under the 1923 Act (*Re Joel's Lease* [1930] 2 Ch. 359), when it was held that the use of a small part of a holding as pasture, most of it being used as a stud farm, did not entitle the tenant to the statutory security of tenure. But it was the main definition in the 1923 Act which brought about this effect: the land was not "either wholly agricultural or wholly pastoral, or in part agricultural, and as to the residue pastoral." And the short answer to the dominant user argument—so reminiscent of the conflict in the early days of Rent Act cases, finally disposed of by the Increase of Rent, etc., Restrictions Act, 1920, s. 12 (2) (ii)—was that s. 1 of the 1948 Act seemed to enact the contrary by plain language. But when it was further urged or submitted that this would mean that the tenant of a large hotel with a little land used for agricultural business purposes unconnected with the hotel, or even of a factory with a certain amount of land from which produce was sold, would be able to dispute notices, Tucker, L.J., after observing that it was not necessary for him to express any concluded view on that question, expressed the opinion that the result might not be as apprehended: "I think that it is a possible view that, having regard to the scheme of the Act of 1948, the language of s. 1, and the provisions of s. 31 and s. 32, it may be that a notice to quit premises of that nature could be held to be invalid without consent in so far as it applies to the agricultural land but valid for the remainder . . . it may be a necessary inference from this Act that that result was intended in the case of a building, for instance, which is totally unconnected with the agricultural land with which it is let." (Section 31 authorises or legalises notices to quit part when given for specified objects: boundary adjustment, cottage building, road making, etc., while s. 32 entitles the recipients of such notices to treat them as affecting the whole. Section 33 provides for reduction of rent when the notice to quit part stands.)

Earlier in his judgment, the learned lord justice had made this comment: "Section 1 (1) of the Act of 1948 . . . clearly contemplates a contract of tenancy which comprises in part agricultural land and in part land which is not agricultural, and it enacts that 'agricultural holding' is to mean the aggregate of the agricultural land comprised in such contract of tenancy. It is remarkable that in the remaining provisions of the Act no provision seems to have been made, at any rate in express terms, for severance of that part of the land which is agricultural from that part which is not agricultural where both are comprised in the same contract of tenancy." Certainly there is no machinery for rent reduction.

Now the rule that a notice to quit part is ineffective is, as I have intimated earlier in this article, not a rule based upon any abstruse doctrine originating from Lincoln's Inn. If a number of chairs were hired under a contract providing for a week's notice, no one would expect that either owner or hirer would be entitled to determine that contract as regards some of the chairs only. Therefore he who sets out to establish that the Agricultural Holdings Act, 1948, has introduced a statutory right to give notice to quit part, even indirectly, must put forward a strong case, and the question is whether sufficiently strong arguments can be found.

I say "even indirectly" because Tucker, L.J., does not suggest that a landlord could give a notice not provided for by the tenancy agreement; and, if I may say so, the words "held to be invalid" do not quite accurately represent the position as it is under the Act. It was the old Def. Reg. 62 (4A) which invalidated certain notices, i.e., given by purchasers, declaring them "null and void"; what s. 24 of the 1948 Act does is to enact that if the tenant serves a counter-notice within a month the notice to quit is to be ineffective unless the Minister consents to its operation; and, while the peculiar language of the definition—*the* aggregate of the agricultural land, etc.—does support the view that Parliament meant to recognise the possibility of part only of demised premises being subject to the provisions of the statute, I cannot, however, think that ss. 31 and 32 help much, there being no provision for apportionment of rent. If the position is, indeed, that part only of demised premises is subject to the provisions of the statute, what has happened, I would suggest, is not that a landlord can effectively give notice to quit part, but that when he gives notice to quit the whole, and the tenant serves a counter-notice under s. 24 (1) "requiring that this subsection shall apply to the notice to quit," and when the landlord then applies for the ministerial consent, the county agricultural executive committee (to whom the consideration of such applications has been delegated) and the Agricultural Land Tribunal (in the event of an appeal) may take into account the extent to which the premises are agricultural as compared with the extent to which they are not agricultural land. In the case of the hotel or factory visualised by counsel in *Dunn* v. *Fidoe, supra*, one at least feels that a landlord's application would be sympathetically entertained, and that if the landlord intimated willingness to accept conditions to be attached to a consent, under s. 25 (5), which would ensure that the same or some other tenant or occupier would continue to cultivate the food-producing area, the applicant, if necessary, agreeing to grant the respondent a new tenancy of "the aggregate of the agricultural land comprised in" the old contract, this would improve his chance of obtaining consent. If the plaintiff in *Dunn* v. *Fidoe, supra*, really wanted the inn rather than the orchards, it is a pity this was not thought of; a condition might have been drafted which would serve as a precedent, perhaps being aptly known as the "live and let live" condition. R. B.

CORRESPONDENCE

[*The views expressed by our correspondents are not necessarily those of* THE SOLICITORS' JOURNAL]

Are they Kidding?

Sir,—From the June issue of Bulletin of Information published by the British Travel and Holidays Association, I note that the American Economic Co-operation Administration carried out a survey of the impressions of American visitors travelling in Europe during the later months of 1949, and I quote from the report:—

"Amongst tourists questioned, the ten principal occupations of visitors were as follows, *in order of importance:* Housewives, students, business executives, merchants, teachers, Government officials, secretaries and clerks, retired persons, clergy and members of the legal profession."

It seems, in the words of the late lamented Damon Runyon, that the standing of our American counterparts in the eyes of their fellow-countrymen is lower than somewhat.

Town Hall, Blackburn.

FRANK SQUIRES, *Deputy Town Clerk.*

PRACTICAL CONVEYANCING—XX

Possession Pending Completion

Some solicitors still appear to be unaware of the serious danger of loss which a vendor may incur by letting a purchaser take possession of a house pending completion on terms involving payment for the use of the house. Such arrangements usually make the purchaser tenant at will and a tenant at will may be protected by the Rent Restrictions Acts. The two important conditions which must exist before such protection arises are, first, that the rateable value must not exceed £100 in London or £75 elsewhere (Rent and Mortgage Interest Restrictions Act, 1939, s. 3 (1)), and, secondly, that the rent must be at least two-thirds of the rateable value (Increase of Rent, etc., Act, 1920, s. 12 (7)).

If the purchaser becomes a protected tenant the vendor will not be able to obtain an order for possession so long as the purchaser pays the rent, even if the purchaser defaults on his contract to buy. In this case, although the vendor may be able to sue for damages, his position is one of great difficulty.

The court will apparently invariably treat payments agreed to be made for " use and occupation " as rent (*Francis Jackson Developments* v. *Stemp* [1943] 2 All E.R. 601, 603). On the other hand, the judgment of Lord Greene, M.R., in that case indicates that payment of interest under a separate agreement having no reference to occupation will not create a tenancy at a rent.

The case of *Finch* v. *Thorpe*, decided by His Honour Judge E. Shackleton Bailey at the Chorley County Court recently, has drawn attention to the problem. In the case of *Francis Jackson Developments* v. *Stemp* the arrangement whereby the purchaser took possession was made after the contract had been signed, and so far as can be ascertained from the report (100 L.J. News. 472) the same occurred in *Finch* v. *Thorpe*. Some comments which have been made about this county court case, however, have caused solicitors to inquire whether there may be a danger of creating a protected tenancy by the use of some common form condition of sale.

Under the National Conditions of Sale, 15th ed., para. 6, if the purchaser is let into possession before actual completion of the purchase then he must pay interest at the rate of 4 per cent. per annum on the remainder of the purchase money as from the date of his taking possession. There is a very similar provision in The Law Society's Conditions of Sale, 1934, whereby if the purchaser is authorised to take possession before actual completion he must pay interest on the purchase money or the balance thereof at the rate of 5 per cent. per annum. As it has been held that a subsequent agreement whereby the purchaser takes possession on payment of interest creates a protected tenancy, will it also be held that a protected tenancy is created if possession is taken on the terms of a contract which makes interest payable? (One assumes, of course, in each case that the interest is such as to be more than two-thirds of the rateable value of the house.)

In *Francis Jackson Developments* v. *Stemp* Lord Greene, M.R., pointed out that under the contract the purchaser had to pay 5½ per cent. interest, but this was payable as from the date fixed for completion. The arrangement for payment of interest as from the date when the purchaser actually entered was comprised in a separate agreement made later. Consequently it was held that the amount payable under the later agreement for possession amounted to rent.

In spite of the apparent analogy between a case where the purchaser takes possession under an arrangement made after the contract and a case where there is provision in the contract for possession to be taken on payment of interest, the court would not, in the writer's view, consider either the National Conditions of Sale or The Law Society's Conditions of Sale as creating a protected tenancy, even though the interest is made payable on the actual taking of possession. It is submitted that there is no reason why one should look upon the interest of the purchaser in possession as a tenancy. Surely the true position is that the purchaser has equitable rights arising under the contract, and the vendor is doing no more than giving effect to one aspect of the purchaser's equitable rights in allowing the purchaser to go into possession. The payment of interest is, therefore, related to the relationship of vendor and purchaser, and cannot be construed as rent under a tenancy. If this argument is correct then there is no tenancy which can be protected by the Rent Restrictions Acts.

Although the matter may appear somewhat doubtful, there would seem to be no reason to amend the National Conditions or The Law Society's Conditions unless there is further authority indicating that the view now taken is mistaken. After all, application of the Rent Restrictions Acts to protect a purchaser taking possession is so far removed from the obvious intention of those Acts that one can expect the court to struggle against a view which would involve a vendor in unexpected and unreasonable hardship. Wherever possible, of course, the safest procedure is to ensure that the interest payable does not exceed two-thirds of the rateable value. In the case of modern houses commanding high vacant possession values this would mean, of course, a low rate of interest. The alternative is not to allow a purchaser to take possession before completion, but in some cases, for instance if requisitioning of a vacant house is threatened, it may be essential to permit the purchaser to enter.

J. G. S.

HERE AND THERE

NEWS FROM YESTERDAY

Once upon a time *Punch* used to devote a good deal more of its space to legal topics than at present and, happening on the 1891 volume, I turned it over to see what our fathers and grandfathers in law were up to nigh on sixty years ago. Well, start with complaints. Jury service was evidently a very sore point. Under a lively drawing of a collection of worried and fidgety-looking men in a jury box is the comment: " These gentlemen are expected to be in a judicial frame of mind after hanging about the precincts of the court for several days, under penalty of a heavy fine, while their private business in the City and elsewhere is going to the dogs (why should not half-pay officers do the work and relieve busy men?)." Some pages farther on there is a scene at the Old Bailey during an imaginary jury strike. The judge hints to counsel for the defence that, while he would not presume to dictate to him, a plea of guilty would solve a serious difficulty, but counsel anticipates no difficulty in establishing the prisoner's innocence before an intelligent jury. Judge: " Yes, but we can't get a jury, intelligent or otherwise." Defence counsel: " If no evidence is offered, my client should be discharged." Prosecution counsel: " Evidence is offered in support of the charge, my lord." Judge: " Yes, but there is no properly constituted body to decide on its credibility." Here the prisoner saves the situation: " Look here, gemmen all, we knows one another, don't we? Well, just to oblige you, as Dartmoor ain't 'alf bad in the summer and, of course, I *did* do it, I plead guilty." Judge: " Prisoner at the bar, we are much beholden to you." (Passes regulation sentence with grateful courtesy.) Innocent fun our fathers enjoyed, didn't they?

NO SKETCHING

There is a brilliant sketch by Harry Furness of the House of Lords hearing an appeal case. Between then and the start of the late war the scene did not change at all—the vast

empty chamber; the Law Lords sitting near the bar of the House where counsel, solicitors, books and documents were crowded higgledy-piggledy in a tiny pen; the attendants in tail coats wearing their chains of office. A bewigged leader is on his feet; half those present are asleep or yawning; even the carved heraldic animals are yawning; a law reporter is reading a sporting paper; a notice forbids anyone to "smile, speak or sketch." Sketching in court was a heinous offence and another picture was inspired by an ultimatum from Denman, J., that if he saw any more barristers drawing, he would turn them out. Strange, for the genial and popular Sir Frank Lockwood was then in his prime, and he could hardly be in court a quarter of an hour without knocking off one of his inimitable caricatures. Anyhow, Harry Furness too seemed to be able to get away with it whether in the House of Lords or in the Lord Chief Justice's court, where he caught the crowded scene of rank and fashion during the great baccarat case when the Prince of Wales was obliged to give evidence and the contact of royalty with a gambling scandal was the talk of England. The other sensation of the year was the Jackson case, when a husband, having got an order for restitution of conjugal rights, proceeded to kidnap the recalcitrant lady and hold her prisoner. The court ordered her release and *Punch* ridiculed the decision in a collection of legal maxims. Specimen: "An Englishman's home is his castle but only the *pied à terre* of the lawfully wedded sharer of his income."

CHANCELLOR'S REFORM

LORD HALSBURY, the Lord Chancellor, had been foreshadowing the near approach of the time when an accused person could go into the witness box. "It may be a bad look-out for rogues," he had said, "but for nobody else." And *Punch* depicts him warning Bill Sykes: "If you *don't* say anything it will go against you; and if you *do* it will be all up with you." To the metre of the "Iolanthe" Chancellor's song, *Punch* makes him sing:—

"If you step inside (as I hope you will),
We shall worm the truth with forensic skill,
And if you decline (as I hope you won't),
We shall know the reasons, friend, why you don't,
The triumph of truth is a triumph for
A highly inquisitive Chancellor."

It didn't actually happen till 1898. "A more dreadful pitfall was never laid for a guilty wretch," said Lord Mersey.

RICHARD ROE.

NOTES OF CASES

COURT OF APPEAL

COUNTY COURT: EXTENT OF JURISDICTION

Wolfe *v.* Clarkson

Tucker and Cohen, L.JJ. 13th July, 1950

Appeal from West London County Court.

The plaintiff landlord sought possession of a house within the Rent Restriction Acts from the defendant tenant under para. (*a*) of Sched. I to the Rent, etc., Act, 1933, without offering alternative accommodation, on the ground of the tenant's failure to execute certain repairs as stipulated in the lease on the determination of which the tenant had held over under the Rent Restriction Acts. In the landlord's further and better particulars his claim for damages for breach of the repairing covenant was quantified at £414. The tenant's objection, then taken, to the jurisdiction of the county court was overruled by the county court judge, and the tenant now appealed.

COHEN, L.J., said that apart from s. 17 (2) of the Rent, etc., Act, 1920, the tenant's contention that the claim for damages for breach of the covenants to repair was outside the jurisdiction of the county court would be well founded. The landlord contended that his claim for those damages was in respect of matters arising out of the Acts, or one of their provisions, having regard to the nature of the claim, which was, amongst other things, a claim to recover possession under s. 3 of, and Sched. I to, the Act of 1933. The judge had held himself bound by *Lee* v. *Roberts* (1925), 159 L.T. News. 531, where the plaintiff had claimed in the High Court for possession, arrears of rent, and damages amounting to £150, and the Court of Appeal had refused him costs on the ground that the case fell within s. 17 (2) of the Act of 1920 and could have been brought in the county court. As he (his lordship) read the pleadings here the landlord was not relying on breach of a contractual obligation. Breach of a repairing covenant was a continuing breach, and on each day on which the premises remained unrepaired a fresh breach occurred, so that on the date of the plaint there was a breach of the covenant. The present case was therefore not distinguishable in principle from *Lee* v. *Roberts*, *supra*, and the county court judge had rightly held himself bound by it.

TUCKER, L.J., concurring, said that the true view of the particulars of claim was that they contained a claim for breach of the statutory obligation to comply with the terms of the original tenancy. On that construction of them, the case came within *Lee* v. *Roberts*, *supra*. Appeal dismissed.

APPEARANCES: *J. P. Widgery* (*Eland, Nettleship & Bull*); *C. Hackforth-Jones* (*Freeman, Son & Curry*).

[Reported by R. C. CALBURN, Esq., Barrister-at-Law.]

SHIPPING: COLLISION: CONCURRENT REPAIRS AND OVERHAUL

The "Carslogie"

Bucknill and Denning, L.JJ., and Lloyd-Jacob, J. 28th July, 1950

Appeal from Willmer, J.

The plaintiffs' vessel was in 1941 damaged in a collision with the defendants' ship, for which the defendants admitted liability. The repairs rendered necessary to the plaintiffs' ship by the collision were not, however, immediately necessary. For convenience the vessel was taken to the United States for repair. That substituted voyage was a trading voyage, so that the vessel remained on hire. On the way she suffered heavy-weather damage necessitating immediate repairs. These took fifty-one days to execute. The collision repairs, to which ten days were attributable, were executed at the same time. The defendants objected to the registrar's including in the damages as assessed by him ten days for detention of the ship, because, they said, there had been no effective detention by their fault, the ship being in any event detained by the simultaneous repair of the heavy-weather damage. On a motion in objection to the registrar's report Willmer, J., said that the distinguishing feature of the case was the fact that the collision repairs were *not* immediately necessary. Under the terms of the seaworthiness certificate, issued after the execution of temporary repairs at Greenock, the damaged vessel was permitted to continue trading subject to the repair of the damage at owners' convenience. Every case must depend on its own particular facts; a plaintiff who sought to claim from a wrongdoer damages for the detention of his ship must prove his case to the satisfaction of the court: see *The Ikala* [1929] A.C. 196, *per* Lord Sumner, at p. 205; *The Argentino* (1888), 13 P.D. 191, *per* Bowen, L.J., at p. 201; *The York* [1929] P. 178. He saw no distinction in principle between those cases and the present case. The heavy-weather damage received by the plaintiffs' ship while crossing the Atlantic required immediate repair, and resulted in the complete immobilisation of the ship for a period

exceeding the time required for the repair of the collision damage. The plaintiffs had not proved against the defendants any loss by the detention of their ship, and the objection to the registrar's report must be upheld. The plaintiffs appealed. (*Cur. adv. vult.*)

BUCKNILL, L.J., said that in *The Haversham Grange* [1905] P. 307, there were two successive collisions. True, the actual decision in that case was that the defendants, the owners of the second colliding ship, were not liable to pay for detention during the repairs of the damage done to the plaintiffs' ship, but the case also clearly showed that the liability to pay for detention attached to the owners of the first wrongdoer, and that that liability was not removed because of the second collision which made further repairs necessary. He did not agree with Willmer, J., that the plaintiffs' decision to send their ship for repairs immediately did not, thereby, make the repairs more "immediately necessary." When the owners, quite properly, arranged to have their ship sent to New York in order that the collision repairs might be done, the owners of the wrongdoing ship became liable to pay for the loss of time incurred by executing the repairs in addition to their cost. The rule, as he (his lordship) understood it, was to attribute to the first damage the repair and the consequent detention which it made necessary. In his opinion, the rule should be extended to the present case where the ship was making her way to the repairing yard under the necessary arrangements before the heavy-weather damage was done. The appeal should be allowed.

DENNING, L.J., gave a concurring judgment, and LLOYD-JACOB, J., agreed. Appeal allowed.

APPEARANCES: *K. Carpmael*, K.C., and *Vere Hunt* (*Bentleys, Stokes & Lowless*); *Scott Cairns*, K.C., and *M. E. C. Rena* (*Clyde & Co.*).

[Reported by R. C. CALBURN, Esq., Barrister-at-Law.]

CHANCERY DIVISION

PRACTICE: JOINDER OF PARTIES: QUASI-PROPRIETARY RIGHT OF INTERVENER

Dollfus Mieg et Cie S.A. *v.* Bank of England

Wynn Parry, J. 20th July, 1950

Procedure summons.

Prior to the outbreak of the war, the plaintiffs, a French company, were the owners of sixty-four identifiable bars of gold which were deposited in a private vault in Limoges. The gold was seized by the Germans during the occupation and taken to Germany, but recovered by American troops. In pursuance of international agreements, the gold bars were in July, 1948, deposited with the defendants, the Bank of England, to be placed to the credit of a gold set-aside account in the name of His Majesty's Treasury on account of the Governments of the United Kingdom, the United States of America and France. The plaintiffs sued the defendants for delivery of the sixty-four gold bars, an injunction and damages. Jenkins, J., allowing the plea of immunity, made an order setting aside the writ and staying all further proceedings (93 SOL. J. 265); on appeal this order was reversed as it transpired that part of the deposited gold bars had been sold by the defendants owing to a mistake (94 SOL. J. 285). The defendants obtained leave to appeal to the House of Lords. The governments of the United States and France applied to be added as defendants, but the Appeals Committee of the House of Lords intimated that the application should be made to the court.

WYNN PARRY, J., said that the present application of the two governments was based on R.S.C., Ord. 16, r. 11, which provided that the court may order the joinder of any parties "who ought to have been joined," or "whose presence before the court may be necessary in order to enable the court, effectually and completely, to adjudicate upon" the issues. The general rule was that a plaintiff was entitled to pursue his remedy against one defendant only and could not be compelled to proceed against other persons. The exceptions to that general rule were correctly divided by the "Annual Practice," 1949, vol. I, p. 254, into three classes of which the second, in favour of interveners whose proprietary rights were directly affected, was relevant here. Although the proprietary rights of the two governments were not directly affected as in *Vavasseur* v. *Krupp* (1878), 9 Ch. D. 351, he (the learned judge) thought that they had an interest akin to the proprietary rights claimed in that case. The two governments were not parties who "ought to have been joined," but, in the exercise of the wide jurisdiction conferred upon the court by the second and alternative limb of the rule, he held that they were parties "whose presence before the court may be necessary in order to enable the court effectually and completely to adjudicate upon" the issues. The application would, therefore, be granted, and the plaintiffs would have leave to appeal.

APPEARANCES: *Sir Hartley Shawcross*, K.C., and *Denys Buckley* (*The Treasury Solicitor*); *Sir Andrew Clark*, K.C., and *R. O. Wilberforce* (*Slaughter & May*); *Geoffrey Cross*, K.C., and *J. R. Lee* (*Freshfields*).

[Reported by CLIVE M. SCHMITTHOFF, Esq., Barrister-at-Law.

KING'S BENCH DIVISION

DIVISIONAL COURT

YOUNG PERSON: AGE LIMIT PASSED PENDING APPEAL

Drover and Another *v.* Rugman

Lord Goddard, C.J., Hilbery and Byrne, JJ. 18th July, 1950

Case stated by Hampshire Quarter Sessions.

At a juvenile court sitting at Ryde, Isle of Wight, an application was made for an order under s. 61 of the Children and Young Persons Act, 1933, by the appellant, an inspector of police, on the ground that the first respondent, being a young person having a parent not exercising proper care and guardianship, was exposed to moral danger and in need of care or protection. The juvenile court ordered the girl to be sent to an approved school and that the second respondent, her father, should contribute 23s. a week towards her maintenance. Father and daughter appealed to quarter sessions. On the hearing of the appeal it was admitted that the girl had attained the age of seventeen years since the hearing before the juvenile court. Quarter sessions therefore refused to entertain it. The inspector appealed.

LORD GODDARD, C.J., said that an appeal to quarter sessions was an appeal by way of re-hearing, there being no formal records of proceedings in a magistrate's court. When a case went to quarter sessions the person who sought an order proved his case over again. That meant that quarter sessions were taking the place of petty sessions. The order appealed from here was properly made so far as jurisdiction was concerned at the time when it was made, and quarter sessions had to re-hear the case in the same circumstances as those in which it was heard by the juvenile court. To make the matter if possible clearer, it was only necessary to look at s. 31 of the Summary Jurisdiction Act, 1879, as amended by s. 1 of the Summary Jurisdiction (Appeals) Act, 1933, in particular the words "any order made by quarter sessions shall have the like effect and may be enforced in the like manner as if it had been made by the court of summary jurisdiction." The case must accordingly be remitted to quarter sessions to be heard.

HILBERY and BYRNE, JJ., agreed. Appeal allowed. Case remitted.

APPEARANCES: *Robert Hughes* (*F. C. Green & Son*, for *C. Merrill*, Ryde); *E. S. Fay* (*Speechly, Mumford & Craig*, for *Lamport, Bassitt & Hiscock*, Southampton).

[Reported by R. C. CALBURN, Esq., Barrister-at-Law.]

DIVISIONAL COURT

RATING: WAREHOUSE FOR RAILWAY HOTELS

Hotels Executive *v.* Derby Corporation

Lord Goddard, C.J., Hilbery and Byrne, JJ. 19th July, 1950

Special case stated by consent of the parties.

The Hotels Executive, set up under s. 5 of the Transport Act, 1947, to assist the British Transport Commission in the exercise of its functions in relation to railway hotels, refreshment rooms, etc., claimed exemption from rating for premises at Derby used as a warehouse for furniture and a variety of articles used in railway hotels, refreshment rooms, etc., as being a " railway or canal hereditament " (s. 85 (1) of the Local Government Act, 1948). The rating authority contended that the premises were not a railway hereditament exempt from rating. The present case was stated by consent of the parties by order of Streatfeild, J., to have that matter determined by the High Court. By the proviso to s. 86 (1) of the Act of 1948 " . . . no hotel or place of public refreshment . . . shall be deemed to be . . . a railway . . . hereditament." By s. 86 (2) " non-rateable purposes " are " (*a*) all purposes of the parts of the undertaking of the [British Transport] Commission concerned with the carriage of goods or passengers by rail . . . and (*b*) all purposes . . . subsidiary . . . to any such part . . ." It was contended for the executive that the proviso to s. 86 (1) showed that hotels would otherwise have fallen within s. 86 (2) (*b*); and that if railway hotels were subsidiary or incidental to carriage of passengers by rail so were railway hotel warehouses, which, however, were not included in the proviso to s. 86 (1).

LORD GODDARD, C.J., said that under s. 2 (1) of the Act of 1947, the British Transport Commission could open hotels which must primarily be for the use of railway passengers, but to which other people could go. The proviso to s. 86 (1) of the Act of 1948 took hotels and refreshment rooms entirely out of the derating provisions of s. 85 (1). Section 86 (2) (*b*) covered only purposes " subsidiary or incidental " to parts of the commission's undertaking which were concerned with the carriage of goods or passengers by rail. Hotels being taken out of the provision, it was impossible to hold that a store which was used for the purpose of hotels was a " railway hereditament."

HILBERY and BYRNE, JJ., agreed. Judgment accordingly.

APPEARANCES: *G. D. Squibb* (*M. H. B. Gilmour*); *Barclay Harris* (*Sharpe, Pritchard & Co.*, for *the Town Clerk*, Derby).

[Reported by R. C. CALBURN, Esq., Barrister-at-Law.]

DIVISIONAL COURT

MERCHANDISE MARKS: NON-BREWED VINEGAR

Kat *v.* Diment

Lord Goddard, C.J., Hilbery and Byrne, JJ. 21st July, 1950

Case stated by a Metropolitan magistrate.

The defendant was charged with unlawfully applying the false trade description of " non-brewed vinegar " to certain bottles of liquid, contrary to s. 2 (1) (*d*) of the Merchandise Marks Act, 1887. The liquid in question was a solution of acetic acid and caramel. Great quantities of it are sold, and, properly prepared, it is wholesome and suitable for the same purposes as malt vinegar. Malt vinegar has been well known since the Middle Ages and was originally invariably the result of a double fermentation. Apart from malt vinegar, vinegar can be made by double fermentation from wine, cider or spirits. The fermented product was similar but also superior to the synthetic product. The magistrate held that vinegar could only result from double fermentation, and that the defendant had therefore applied a false trade description to the blend in question. He therefore convicted him. The defendant appealed.

LORD GODDARD, C.J., said that he could not see that, for the purposes of s. 2 of the Act of 1887, there was any real difference between saying that a person acted without intent to defraud and that he acted innocently: considerations which applied to the latter expression must apply to the former. Where a statute forbade the doing of a certain act, the doing of the act in itself supplied *mens rea*. It was no defence for the defendant to say that he did not know of the prohibition or that he did not know that what he was doing amounted to the doing of something forbidden by the Act. To accept such a plea would be to allow ignorance of the law to be set up as a defence. By throwing the onus on the defendant of proving that he acted without intent to defraud, the statute assumed that the doing of the act alone implied an intent to defraud, but that the person charged could escape if he showed that he did not do the act intentionally. His motive and his understanding of the statute were alike immaterial. If the sale had been deliberately made of goods which it had been shown bore a false description so that the seller intended that those goods should be delivered to the purchaser, there was no room for the defence put forward to be set up. The line of authority on the subject was unbroken. The Act was intended to protect not only the public or traders who might purchase goods but also the proprietors of trade marks and those who manufactured and dealt in the genuine article. In his opinion those who made what alone could properly be called " vinegar " were quite entitled to have it established that a solution of the character in the present case was not truly described as vinegar at all. It was intentionally sold as a sort of vinegar, which it was not, and he agreed that there was no evidence on which the magistrate could find that the defendant had established a defence. The appeal must be dismissed.

HILBERY and BYRNE, JJ., agreed. Appeal dismissed.

APPEARANCES: *Basil Drewe*, K.C., and *K. Johnston* (*Stephenson, Harwood & Tatham*); *Sir David Maxwell Fyfe*, K.C., and *Vernon Gattie* (*Neve, Beck & Co.*).

[Reported by R. C. CALBURN, Esq., Barrister-at-Law.]

DIVISIONAL COURT

ADULTERATION OF MILK: BURDEN OF PROOF: FORM OF INFORMATION

Moore *v.* Ray and Another

Lord Goddard, C.J., Hilbery and Byrne, JJ. 21st July, 1950

Case stated by Lancashire justices.

An information was preferred against the defendant, a licensed retailer of milk, alleging that he sold through his agent to the prejudice of the purchaser " a certain article of food, namely, milk, which was not of the nature, substance and quality " of the article demanded by the purchaser, contrary to s. 3 of the Food and Drugs Act, 1938. That defendant preferred an information under s. 83 of the Act against the second defendants, a company, who had supplied the milk to him, alleging that the offence was due to their act or default. The justices dismissed both informations because, though they found that the milk was adulterated, on the facts which they stated in the case, they were of opinion that there was a reasonable doubt who was responsible for the adulteration. The prosecutor appealed.

LORD GODDARD, C.J., said that the justices were evidently impressed by the evidence of the defendant, finding that he did not add the water, and so on. It was not, however, clear whether they had it in their minds that, unless he could prove that somebody else, namely, the person whom he brought before the court under s. 83, was guilty of the contravention he would have himself to be convicted because he did in fact sell an article to the prejudice of the purchaser. Perhaps the justices had thought that they had to find either that the defendant retailer added water or that the defendant company added water, by one of their servants; but that was not what s. 83 provided: there was no defence to this prosecution, although the justices might not think that the defendant retailer had added water, unless he could show, not only that he himself acted with all due diligence, but that somebody else, who had to be brought before the court, had committed the offence. The case must go back to the justices for reconsideration accordingly.

He would add the following observations: It had for many years been common form to lay informations of this type in the form used here, namely, unlawfully selling to the prejudice of the purchaser a certain article of food " not of the nature, substance and quality " of the article demanded

by the purchaser. Section 3 of the Act of 1938 said "not of the nature, or not of the substance, or not of the quality." Thus a defendant must be guilty of an offence if he sold something which offended against the statute in any one of three different respects, or in all of three different respects; but, as that court had pointed out in *Bastin* v. *Davies* [1950] W.N. 301, those were three separate offences: the defendant was entitled to know in which respect the article in question was alleged to offend against the section. Clerks to justices, sampling officers and food inspectors should note that in all such cases the information should state in which respect it was alleged that the article was defective and an offence had been committed. If they were in doubt they could lay more than one information. The point was not taken here, and so the court would not give a formal ruling upon it. The above remarks were merely for the guidance and information of the officials concerned. Appeal allowed. Case remitted.

APPEARANCES: *J. D. Cantley* (*Norton, Rose, Greenwell and Co.*, for *Sir R. H. Adcock*, Preston); *B. B. Stenham* (*Bentleys, Stokes & Lowless*, for *Steels*, Warrington).

[Reported by R. C. CALBURN, Esq., Barrister-at-Law.]

DIVISIONAL COURT

ROAD TRAFFIC: POULTRY SHED ON WHEELS

Garner *v.* Burr and Others

Lord Goddard, C.J., Hilbery and Byrne, JJ. 21st July, 1950

Case stated by Norfolk justices.

The defendants were variously concerned in the towing along a public road by a motor tractor (a land tractor: see reg. 3 (1) of the Motor Vehicles (Construction and Use) Regulations, 1947) of a poultry shed mounted on four iron wheels. They were prosecuted for contravening s. 3 (1) and (3) of the Road Traffic Act, 1930, by using a trailer which did not comply with the regulations applicable to vehicles of its class or description. The shed was being towed along the road to be sold. It was contended for the prosecutor that the poultry shed was a trailer within the meaning of s. 1 of the Act of 1930; that it was not a "land implement" within the meaning of reg. 3 (1) of the regulations; and that it did not comply with regs. 49, 50, 51 and 60 of the regulations. It was contended for the defendants that the shed was a land implement within the meaning of reg. 3 (1), and that it was not a trailer within the meaning of s. 1 of the Act of 1930. The justices dismissed the informations, holding that the shed was not a vehicle and therefore not a trailer as defined in s. 1 of the Act; and that, even if it were a vehicle, it was a land implement and therefore excluded from the requirements of regs. 49, 50, 51 and 60.

LORD GODDARD, C.J., said that the question was simply whether an empty poultry shed fitted with iron wheels was a vehicle. The justices had put too narrow an interpretation on the word "vehicle" for the purposes of the Road Traffic Act, 1930. The regulations plainly related to many vehicles which were not designed for the carriage of goods or passengers, and in his opinion the Act was aimed at anything which would run on wheels and which was being drawn by a tractor or other motor vehicle. This poultry shed was a vehicle within the meaning of the Act, and there was clearly an offence in that the regulations had not been observed. A "land implement" was exempted from regs. 49, 50, 51 and 60, and was defined as any implement or machinery used with a land locomotive or a land tractor in connection with agriculture, grass cutting, forestry, land levelling, dredging or similar operations, and included a living van and any trailer which for the time being carried only the necessary gear or equipment of the land locomotive or land tractor which drew it. That definition was designed to cover such agricultural machinery as reapers or binders; but a poultry shed was not an implement or machinery within the definition. The case must be remitted to the justices with an intimation that the charges were proved. The matter of penalty was for them; no doubt the prosecution had been brought to establish a principle.

HILBERY and BYRNE, JJ., agreed.

APPEARANCES: *T. F. Southall* (*Sharpe, Pritchard & Co.*, for *H. O. Brown*, Norwich).

[Reported by R. C. CALBURN, Esq., Barrister-at-Law.]

DIVISIONAL COURT

POLICE: RIGHT OF SEARCH

Willey *v.* Peace

Lord Goddard, C.J., Byrne and Finnemore, JJ. 25th July, 1950

Case stated by Middlesex Quarter Sessions.

A metropolitan police constable, having watched the defendant behave suspiciously, showed him his credentials and asked him what he was doing. The defendant grew abusive and said that he would go to the police station to complain. At the station, the station sergeant, knowing that a house nearby had recently been broken into, suspected that the defendant had stolen property in his pocket. The sergeant and the constable searched the defendant, who resisted and assaulted the constable. Nothing was found on him. He was charged with assaulting the constable when in the execution of his duty contrary to s. 12 of the Prevention of Crimes Act, 1871. He was convicted of that offence by petty sessions and fined £5. His appeal to quarter sessions was dismissed, and he now appealed to the Divisional Court. By s. 66 of the Metropolitan Police Act, 1866, a police constable may search "any person who may be reasonably suspected of having or conveying . . . anything stolen . . ." It was argued that the constable had no right to search the defendant when he did, and so could not be in execution of his duty in so doing.

LORD GODDARD, C.J., said that to say that s. 66 only applied where a person had or conveyed the property in the street was putting too limited an interpretation on it, as was shown by *R.* v. *Fisher* (1875), 39 J.P. 612. In *Hadley* v. *Perks* (1866), L.R. 1 Q.B. 444, Blackburn, J., stated that the section authorised a constable to arrest a person *in transitu* "in the street." But the judge was there contrasting the case where there was a power of search because a person was conveying something, and that where goods were in a house or warehouse and a search warrant must be obtained. A man did not cease to be "having or conveying" a thing because he walked into a police station with it still on him, and intended to walk out with it if the police let him go. As soon as the defendant entered the police station, the sergeant, as he reasonably suspected him of having stolen property in his pocket, was entitled to search him. Section 66 applied where a person was suspected of carrying stolen goods in the course of a journey. The fact that the defendant went into a police station did not break the transit.

BYRNE and FINNEMORE, JJ., agreed. Appeal dismissed.

APPEARANCES: *Sir John Cameron* (*Hamilton-Hill and Evershed*); *Gerald Thesiger*, K.C., and *J. C. Phipps* (*Solicitor, Metropolitan Police*).

[Reported by R. C. CALBURN, Esq., Barrister-at-Law.]

DIVISIONAL COURT

CUSTODY OF INFANTS: PARENTS IN DIFFERENT COUNTIES AND CHILD IN IRELAND: JURISDICTION

R. *v.* Sandbach Justices; *ex parte* Smith

Lord Goddard, C.J., Hilbery and Byrne, JJ. 26th July, 1950

Application for an order of certiorari.

The father of a child lived in Oxfordshire, the mother, his wife, in Cheshire, and the child with the mother's aunt in Northern Ireland. On the application of the mother, Sandbach (Cheshire) justices made an order awarding her

the legal custody of the child and directing the father to pay £1 a week for its maintenance until it attained the age of sixteen years. The father now applied for an order of certiorari for the quashing of that order on the grounds (1) that those justices did not have jurisdiction under the Guardianship of Infants Acts to hear the mother's application for custody; and (2) that, in any event, justices had no jurisdiction to make an order regarding the custody of a child living abroad.

LORD GODDARD, C.J., giving the judgment of the court, said that in their opinion the effect of ss. 5 and 9 of the Guardianship of Infants Act, 1886, and s. 7 (1) of the Guardianship of Infants Act, 1925, was that proceedings for the custody of a child other than those taken in the High Court must be brought where the respondent to the proceedings (in the present case, the father) lived, and not where the applicant lived. For that reason the justices in Cheshire had no jurisdiction to make the order in the present case.

The second ground of the application raised a question of more general importance, and the court would express an opinion on it. The question was whether, apart from any local limitation imposed on inferior courts by the Acts, a court could make an order relating to an infant at a time when the infant was outside the jurisdiction. In *Harris* v. *Harris* (1949), 93 SOL. J. 514; 47 L.G.R. 617, at p. 621, Lord Merriman, P., said that it was the rarest possible thing for a judge of the Divorce Court to make an order for custody in respect of a child who was out of the jurisdiction. That implied that the court had jurisdiction to make such an order. In *M'Lean* v. *M'Lean* [1947] S.C. 79, the Court of Session held that they had jurisdiction to make an order relating to a child in England, the parents being domiciled in Scotland. A court had apparently jurisdiction to make such an order, therefore, apart from any local limitation. But it would be very unusual and, in many cases, a most undesirable thing, more especially for justices, to make one. The court would have difficulty in exercising its powers of supervision, and a provision for access would be illusory. But however much the court disapproved of the order of the justices, the ground for the order of certiorari must be that the justices in Cheshire had no jurisdiction in the present case as the father was not resident there. Order of certiorari.

APPEARANCES: *P. M. Blomefield* (*Stafford Clark & Co.*, for *Soanes & Welch*, Burford); *H. J. I. Summerfield* (*Boxall and Boxall*, for *Norris & Mellor*, Stoke-on-Trent).

[Reported by R. C. CALBURN, Esq., Barrister-at-Law.]

DIVISIONAL COURT

UNIVERSITY: DOMESTIC DISPUTE: MANDAMUS

R. *v.* Dunsheath; *ex parte* Meredith

Lord Goddard, C.J., Byrne and Finnemore, JJ.
28th July, 1950

Application for an order of mandamus.

On 14th June, 1950, the applicant forwarded to the Clerk of Convocation of London University requisitions signed by seventy-nine members of convocation asking for a special meeting of convocation to be summoned, in accordance with No. 62 of the university's statutes, to consider a motion on political discrimination in the university, it being complained that the appointment of a certain lecturer had not been renewed on account of his political opinions. The respondent, the chairman of convocation, refused to call the special meeting, ruling the motion out of order because it was not one "relating to the university." Accordingly this application was made for an order of mandamus directing the respondent to summon without further delay an extraordinary meeting of convocation in accordance with statute 62. By statute 6 of the University, His Majesty in Council is the Visitor of the University.

LORD GODDARD, C.J., delivering the judgment of the court, said that it was argued for the respondent that this was not a matter for the court's action by way of mandamus, the appropriate authority to consider the question being the Visitor of the University. Mandamus would be granted to enforce a public duty affecting the rights of an individual provided that there were no more appropriate remedy; but where there was a visitor of a corporate body, the court would not interfere with matters within his province. Any question of a domestic nature was essentially one for the domestic forum. That was supported by all the authorities concerning visitatorial powers and duties. The authorities were consistent, and *R.* v. *Hertford College, Oxford* (1878), 3 Q.B.D. 693, was important because it showed that the same principles applied whether the corporation were set up by statute or by charter. Here an officer of the university was said to have refused to perform a duty placed upon him by the statutes of the university: that was essentially a question for the Visitor. Application refused.

APPEARANCES: *D. N. Pritt*, K.C., and *R. Millner* (*Gaster and Turner*); *K. Diplock*, K.C., and *H. E. R. Boileau* (*Field, Roscoe & Co.*).

[Reported by R. C. CALBURN, Esq., Barrister-at-Law.]

LANDLORD AND TENANT: INVALID NOTICE TO QUIT

Chez Auguste, Ltd. *v.* Cottat

Lord Goddard, C.J. 28th July, 1950

Action.

When the plaintiff company bought premises at Old Compton Street, London, where they carried on a restaurant business, the defendant was in possession of the two upper floors. On 14th November, 1946, believing that the defendant was the tenant of the upper floors and that she was holding them on a weekly tenancy, they served on her a notice to quit expiring on 22nd November, 1946. No action was brought on that notice, as it transpired that it was the defendant's husband who was the tenant, he being the assignee of a lease which would expire on 22nd March, 1948, the rent reserved by which was £260 a year, payable in advance by equal weekly payments. On 13th May, 1948, a second notice to quit was served on the defendant, again on the basis of a weekly tenancy, although the landlords had then had an opportunity of examining the title under which the tenant held the demised premises; but again no action was brought on it. The defendant's husband continued to pay the rent until he died on 29th August, 1948. On 20th September, 1949, the landlords served the following notice on the defendant: "We . . . your landlords . . . hereby give you, both in your personal capacity and as administratrix of Voltaire Cottat, deceased, notice to quit and deliver up possession of the house and premises with the appurtenances . . . which you hold of them as tenant thereof, on Monday, 3rd October, 1949, or at the expiration of the current period of your tenancy which shall expire next after the service upon you of this notice." It was contended on behalf of the defendant that the notice in the form given by the plaintiffs was bad because the defendant would be entitled to regard it as determining a weekly tenancy. For the landlords it was contended that the notice of 20th September, 1949, in effect said: "If you are a weekly tenant, go at the end of the week; alternatively, if you are a yearly tenant, go at the end of the year," and was accordingly valid.

LORD GODDARD, C.J., said that in his opinion the notice of 20th September, 1949, was clearly one given to determine a weekly tenancy. Notices to quit must not be ambiguous: they must tell the tenant what was required of him. It had to be remembered that the landlords had served two previous notices to quit, both on the basis of a weekly tenancy. The defendant was clearly a yearly tenant holding over under the lease which had been assigned to her husband. The landlords, however, then said that the notice was apt to determine also the yearly tenancy; but in his opinion it was impossible so to construe it: the words "or at the expiration of the current period of your tenancy" must be

taken as referring to the current period of a week. The case was governed by the reasoning in *Mills* v. *Goff* (1845), 14 M. & W. 72, where Pollock, C.B., held invalid a notice of 17th June, 1840, in these terms to quit a yearly tenancy which had begun on 11th October of a previous year: to quit "on 11th October now next ensuing, or such other day and time as the said tenancy may expire on." Pollock, C.B., said that the notice was bad because the tenant might reasonably infer that his landlord was in error as to the length of notice necessary. The present notice was, and always had been, regarded as a notice to terminate a weekly tenancy; and the landlords sought to change their tune when they realised that the defendant was a yearly tenant. Judgment for the defendant.

APPEARANCES: *Michael Hoare* (*Joynson-Hicks & Co.*); *Leonard Caplan* (*Percy Haseldine & Co.*).

[Reported by R. C. CALBURN, Esq., Barrister-at-Law.]

ELECTRICAL TREATMENT: INSUFFICIENT WARNING

Clarke *v.* Adams

Slade, J. 31st July, 1950

Action.

The plaintiff was treated by the defendant, a physiotherapist, for fibrositic condition of the left heel. He suffered injury by burning which resulted in his having to have the leg amputated below the knee, and brought this action for damages. Before applying the treatment the defendant gave the plaintiff this warning: "When I turn on the machine I want you to experience a comfortable warmth and nothing more; if you do, I want you to tell me." Evidence was given by the chief examiner for the Chartered Society of Physiotherapy that that warning was an entirely proper one.

SLADE, J., said that clearly in physiotherapy the co-operation of the patient was vital. The instrument used was dangerous because burns caused by it could lead to serious consequences. It was extremely unlikely that the defendant, a skilled physiotherapist, on being told by the plaintiff that he was undergoing such pain that he could not bear it, would take no precautions. There was no evidence that the apparatus used was defective. The sole question left was therefore whether the warning given by the defendant, said to be an entirely proper one, was sufficient. There must in such circumstances as the present be a warning of danger as it would appear to a hypothetically reasonable person. Would the words used here warn such a person that his safety depended on his informing the defendant the moment he felt more than a comfortable warmth? The warning must be couched in terms which made it abundantly clear that it was a warning of danger. He was not satisfied that this warning, although the very warning which the defendant had been taught to give, was adequate, and on that ground the plaintiff was entitled to recover.

Special damage £763 4s. 3d. General damages £2,500. Judgment for the plaintiff.

APPEARANCES: *D. Karmel*, K.C., and *C. R. Beddington* (*Mawby, Barrie & Letts*); *Sir Shirley Worthington-Evans* (*William Charles Crocker*).

[Reported by R. C. CALBURN, Esq., Barrister-at-Law.]

COURT OF CRIMINAL APPEAL

PRACTICE NOTE: AMENDMENT OF INDICTMENTS

R. *v.* Pople and Others

Humphreys, Finnemore and Slade, JJ. 18th July, 1950

Appeal from conviction.

The appellants were charged on indictment with obtaining money by false pretences. At the close of the case for the prosecution objection was taken that there was no evidence to support the charges of obtaining money, and the prosecution asked for leave to amend those counts by altering in each count the sum of money alleged to have been obtained to "a valuable security, to wit, a cheque" for that sum. That application was granted, and it was argued on this appeal that the judge had no jurisdiction to direct that amendment.

HUMPHREYS, J., giving the judgment of the court on that submission, which alone calls for report, said that until 1915 the powers of amendment had been very limited, and s. 5 (1) of the Indictments Act, 1915, was intended to provide that in future the power should be very considerably extended. That provision gave the court power before or at any stage of the trial to order an amendment where the indictment was "defective," "unless having regard to the merits of the case the required amendment cannot be made without injustice." It was argued for the appellants that to be "defective" an indictment must be one which in law did not charge any offence at all and was therefore bad on its face. The court did not take that view. Alterations of description might be made in proper cases, and the court had no hesitation in the present case in supporting the judge's action. But the responsibility for the correctness of an indictment lay in every case on counsel for the prosecution and not on the court. No counsel should open a criminal case without having satisfied himself on that point. If in his opinion the indictment needed amendment, the necessary application should be made before the accused person was arraigned and not, as in the present case, after all the evidence for the prosecution had been called. There might well be amendments which would be properly made at the beginning of a trial which would be oppressive and embarrassing to the accused person if made at the close of the case for the prosecution. Ruling accordingly.

[Reported by R. C. CALBURN, Esq., Barrister-at-Law.]

SURVEY OF THE WEEK

STATUTORY INSTRUMENTS

Bacon (Control and Prices) (Amendment) Order, 1950. (S.I. 1950 No. 1460.)

Draft Colonial Stock Acts Extension (Bechuanaland Protectorate) Order, 1950.

Draft Colonial Stock Acts Extension (Swaziland Protectorate) Order, 1950.

County of Moray (Romach Burn and Black Burn) Water Order, 1950. (S.I. 1950 No. 1464.)

County of Stafford (Electoral Divisions) Order, 1950. (S.I. 1950 No. 1459.)

Entertainments Duty Order, 1950. (S.I. 1950 No. 1467.)

Fur Wages Council (Great Britain) (Constitution) Order, 1950. (S.I. 1950 No. 1450.)

Land Registration Fee Order, 1950. (S.I. 1950 No. 1458 (L. 22).)

After 1st October no fee will be payable for the registration of charges on registered land accompanying transfers for value, but there will be no abatement of one-half in the fee for noting further advances in the case of such charges unless registered before that date.

Milk (Great Britain) (General Licence No. 3) Order, 1950. (S.I. 1950 No. 1456.)

National Insurance (Industrial Injuries) (Insurable and Excepted Employments) Amendment Regulations, 1950. (S.I. 1950 No. 1468.)

Newcastle upon Tyne—Edinburgh Trunk Road (Camptown and Kiln Burn Diversions) Order, 1950. (S.I. 1950 No. 1446.)

Purchase Tax (No. 8) Order, 1950. (S.I. 1950 No. 1444.)

Ships' Stores (No. 2) Order, 1950. (S.I. 1950 No. 1462.)

Soap Order, 1950. (S.I. 1950 No. 1461.)

Upholstery Cloth (Utility) (Amendment No. 7) Order, 1950. (S.I. 1950 No. 1440.)

Use of Milk (Suspension of Restriction) (No. 2) Order, 1950. (S.I. 1950 No. 1457.)

Utility Curtain Cloth (Amendment No. 4) Order, 1950. (S.I. 1950 No. 1438.)

BOOKS RECEIVED

An Outline of Scientific Criminology. By NIGEL MORLAND. 1950. pp. (with Index) 284. London: Cassell & Co., Ltd. 12s. 6d. net.

Superannuation Scheme for Those Engaged in the National Health Service. An Explanation. Revised 1950. pp. 26. London: H.M. Stationery Office. 3d. net.

A Measuring Diagram for Daylight Illumination. By PERCY J. WALDRAM, F.R.I.C.S. 1950. pp. 19. London: B. T. Batsford, Ltd. 5s. net.

The British Journal of Delinquency, Vol. 1, No. 1. July, 1950. London: Baillière Tindall & Cox (for the Institute for the Study and Treatment of Juvenile Delinquency). Annual Subscription: 27s. 6d. net.

Income Tax Treaties. By ALBERT A. EHRENZWEIG, Professor of Law, University of California, and F. E. KOCH, Dr. Jur., A.C.W.A., Certified Accountant, London. With a Foreword by ROSWELL MAGILL. 1950. pp. xxxviii and (with Index) 384. New York: Commerce Clearing House, Inc.

The National Health Service. By ROGER ORMROD, M.A., B.M., B.Ch. (Oxon.), of the Inner Temple and the Western Circuit, Barrister-at-Law, and HARRIS WALKER, of the Middle Temple and the Western Circuit, Barrister-at-Law. Annotations to the National Health Service Acts, 1946 and 1949, by JOHN H. ELLISON, M.A. (Cantab.), of Lincoln's Inn and the Oxford Circuit, Barrister-at-Law. 1950. pp. ix and (with Index) 241, with Appendices. London: Butterworth & Co. (Publishers), Ltd. 27s. 6d. net.

Housing Administration. Supplement to Third Edition. By STEWART SWIFT, M.B.E. 1950. pp. xi and 120. London: Butterworth & Co. (Publishers), Ltd. 9s. 6d. net.

Divorce Case Book. By WILLIAM KEE, of the Inner Temple and the South-Eastern Circuit, Barrister-at-Law, and SHERARD COWPER-COLES, of the Inner Temple, Barrister-at-Law. Consulting Editor: GEOFFREY TYNDALE, K.C., a Bencher of the Inner Temple. 1950. pp. xxx, 266 and (Index) 13. London: Butterworth & Co. (Publishers), Ltd. 30s. net.

Kelly's Draftsman. Ninth Edition. By W. J. WILLIAMS, B.A., of Lincoln's Inn, Barrister-at-Law. 1950. pp. lxiv, 666 and (Index) 61. London: Butterworth & Co. (Publishers), Ltd. 50s. net.

The Law of Trusts. By GEORGE W. KEETON, M.A., LL.D., of Gray's Inn, Barrister-at-Law, Professor of English Law, University of London. Fifth Edition. 1950. pp. lix and (with Index) 475. London: Sir Isaac Pitman & Sons, Ltd. 30s. net.

NOTES AND NEWS

Honours and Appointments

Mr. F. S. MARSHALL has been appointed magistrates' clerk, collecting officer and clerk to the licensing justices for the Petty Sessional Division of Skyrack.

Personal Notes

Mr. John Humphrey Jones, solicitor, of Mold, was married on 7th September to Miss Marjorie Prince, of Flint.

Mr. J. K. Maude, who is due to take up an appointment as assistant solicitor to the Cheltenham Corporation next month, was married on 7th September to Miss Helen Cecilia McLean, of Caldy, Cheshire.

Mr. G. L. Stoate, solicitor, of Bristol, was married on 2nd September to Miss Mary Joy Evans, of Clifton.

Mr. N. J. Winter, solicitor, of Southsea, was married on 2nd September to Miss Ena Mackenzie Strang, of Edinburgh.

Miscellaneous

SERVICE AT WESTMINSTER ABBEY, MONDAY, 2ND OCTOBER, 1950

On the occasion of the re-opening of the Law Courts a special service, at 11.45 a.m., will be held in Westminster Abbey, at which the Lord Chancellor and His Majesty's Judges will attend.

Barristers attending the service must wear robes. All should be at the Jerusalem Chamber, Westminster Abbey (Dean's Yard Entrance), where robing accommodation will be provided not later than 11.30 a.m.

The south transept is reserved for friends of members of the Bar and a limited number of tickets of admission are issued. Two of these tickets will be issued to each member of the Bar whose application is received by the Secretary of the General Council of the Bar, 2 Stone Buildings, Lincoln's Inn, W.C.2, not later than Thursday, 28th September.

No tickets are required for admission to the north transept, which is open to the public.

WESTMINSTER CATHEDRAL

A Votive Mass of the Holy Ghost (the Red Mass) will be celebrated on Monday, 2nd October, 1950 (the opening of the Michaelmas Law Term), at 11.45 a.m.

Counsel will robe in the chapter room at the Cathedral. The seats behind counsel will be reserved for solicitors.

Those desirous of attending are asked to inform the Hon. Secretary, Society of Our Lady of Good Counsel, 6 Maiden Lane, W.C.2, so that an adequate number of seats may be reserved.

Wills and Bequests

Mr. E. F. Hughes, solicitor, of John Street, Bedford Row, W.C.1, left £97,803 (£97,563 net).

OBITUARY

SIR WALTER HALSEY

Sir Walter Johnston Halsey, Bt., solicitor, of St. James's Place, London, S.W.1, died on 2nd September, aged 82. He was admitted in 1899 and was chairman of the Law Courts Branch of the Legal Insurance Company.

MR. W. HOOPER

Mr. Wilfrid Hooper, solicitor, of Redhill, died on 2nd September, aged 69. He was admitted in 1903.

MR. W. G. HOWELL

Mr. William Gough Howell, solicitor, Lord Mayor of Cardiff in 1938-39, died recently, aged 85. He was admitted in 1895.

SIR HENRY KIMBER

Sir Henry Dixon Kimber, Bt., solicitor, of Lombard Street, London, E.C.4, died on 4th September, aged 88. Admitted in 1887, he was elected chief commoner of the Corporation of the City of London in 1919, and retired from the Common Council earlier this year. He was a governor of St. Thomas's Hospital and Deputy Lieutenant of the City of London.

MR. G. C. MEADE-KING

Mr. George Cyril Meade-King, solicitor, of Bristol, died on 3rd September, aged 80. Admitted in 1902, he was for many years hon. secretary and treasurer of the Bristol Incorporated Law Society, and he subsequently served as president. He was also a member of the Bristol University Board of Legal Studies. He served on the council of Clifton High School for Girls for forty-seven years and was a governor of Clifton College.

"THE SOLICITORS' JOURNAL"

Editorial, Publishing and Advertising Offices: 88–90, Chancery Lane, London, W.C.2. Telephone: Holborn 1403.

Annual Subscription: £3 inclusive (payable yearly, half-yearly or quarterly in advance).

Advertisements must be received first post Wednesday.

Contributions are cordially invited and should be accompanied by the name and address of the author (not necessarily for publication).